This distinction was not applicable here. NYU used the copyrighted material for the purpose of demonstrating the activities of NYU's Child Study Center so that attendees would donate money to NYU's Child Study Center. Unlike Moral Majority, there was no evidence that NYU credited Planet Earth as the copyright owner, even though the testimony was clear that Planet Earth already had objected to NYU's use of the copyrighted material for other purposes. NYU failed to present any evidence that its use of the copyrighted material was a "fair use." NYU had the burden of doing so, and it failed to meet that burden. Because there was no legally sufficient evidence for a reasonable jury to render a verdict for NYU, the Second Circuit and the District Court erred for failing to find copyright infringement as a matter of law.

The decision of the Second Circuit in this case has created a conflict with the decision of the Ninth Circuit in Moral Majority. That conflict can only be resolved by a decision of this Court.

CONCLUSION

For the forgoing reasons, Petitioner submits that this Court should grant certiorari in this case to review the holding of the Second Circuit affirming the District Court's denial of judgment as a matter of law for copyright infringement.

Respectfully submitted,

March ___, 2006

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Attorneys for Petitioner
Planet Earth Foundation d/b/a
Planet Earth Media

Of Counsel:
Robert T. Maldonado
Leslie K. Nguyen

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK UNIVERSITY,	
Plaintiff,	
	03 **CIVIL** 4919 (LLS)
-against-	
	JUDGEMENT
PLANET EARTH FOUNDATION d/b/a, PLANETT EARTH MEDIA, LISA BLUME, and JOHN KEITH BLUME a/k/a KEITH BLUME,	
Defendants.	

A Jury Trial before the Honorable Louis L. Stanton, United States District Judge, having begun on January 10, 2005, and at the conclusion of the trial, the jury having rendered a verdict in favor of the plaintiff in the amount of $562,500.00; the Court, thereafter, on February 4, 2005, having issued its Order directing the Clerk to award to plaintiff pre-verdict interest in the amount of $102,498.29, plus interest at the rate of $163.97 per day from January 18, 2005 to date of entry of the judgment of $4,591.16, denying plaintiff's application for attorney's fees, and directing the Clerk to enter judgment in accordance with the jury's verdict, together with interest as directed above, and costs and disbursements of the action, it is,

ORDERED, ADJUDGED AND DECREED: That the plaintiff have judgment in the total sum of $669,589.45 as

against the defendants with costs and disbursement and plaintiff's application for attorney's fee is denied.

DATED: New York, New York
February 15, 2005

J. Michael McMahon
Clerk of Court

BY: /s/
Deputy Clerk

This document was entered on the docket on February 15, 2005.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK UNIVERSITY,	:	
	:	Civil Action No.
Plaintiff,	:	03 CV 4919 (LLS)(GWG)
PLANET EARTH FOUNDATION d/b/a PLANET EARTH MEDIA, LISA BLUME, and KEITH BLUME,	:	
Defendants.	:	

DEFENDANT'S NOTICE OF MOTION AND MOTION FOR JUDGMENT AS A MATTER OF LAW OR IN THE ALTERNATIVE, FOR A NEW TRIAL

To: R. Brian Black, Esq.
Hogan & Hartson, L.L.P.
875 Third Avenue
New York, New York 10022

Attorneys for Plaintiff

PLEASE TAKE NOTICE that at a date to be determined by the Court at the United States District Court for the Southern District of New York, United States Courthouse, 500 Pearl Street, New York, New York 10007, Defendant Planet Earth Foundation (hereinafter "Planet Earth"), will move this Honorable Court for an Order

granting judgment as a matter of law or, in the alternative, a new trial, under Rules 50 and 59, F.R.Civ.P.

The foregoing motion is based upon the facts adduced at trial and the facts and authorities cited in the Memorandum In Support of Defendant's Motion For Judgment As A Matter Of Law Of, In The Alternative, For A New Trial, submitted herewith.

Dated:
February 22, 2005

Respectfully submitted,
COOPER & DUNHAM LLP

/s/Norman H. Zivin
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(212) 278-0400

Attorneys for the Defendant
Planet Earth Foundation

This motion is denied.
So ordered.

March 8, 2005
/s/Louis L. Stanton

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 23rd day of December, two thousand and five.

PRESENT:

HON. JAMES L. OAKES,
HON. GUIDO CALABRESI,
HON. RICHARD C. WESLEY,
Circuit Judges.

NEW YORK UNIVESITY,
Plaintiff-Counter-Defendant-Appellee,

v. No. 05-1832-cv

PLANET EARTH FOUNDATION, doing business as Planet Earth Media,
Defendant-Counterclaimant-Appellant.

LISA BLUME,
Defendant.

JOHN KEITH BLUME, also known as Keith Blume,
Defendant-Counterclaimant

For Appellant: NORMAN H. ZIVIN (Robert T. Maldonado, *on the brief*), Cooper & Dunham LLP, New York, N.Y.

For Appellee: R. BRIAN BLACK (Dori Ann Hanswirth, Hogan & Hartson L.L.P., New York, N.Y., and Ada Meloy, New York University, New York, N.Y., *on the brief*), Hogan & Hartson L.L.P., New York, N.Y.

Appeal from a final decision of the United States District Court for the Southern District of New York (Stanton, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

At the conclusion of trial, a jury awarded Plaintiff-Counter-Defendant-Appellee New York University ("NYU") $562,000 in damages, plus interest, on its breach of contract claim against Defendant-Counterclaimant-Appellant Planet Earth Foundation ("Planet Earth"), and found NYU not liable

on Planet Earth's counterclaims for breach of contract and copyright infringement. Planet Earth moved, pursuant to Federal Rule of Civil Procedure 50, for judgment as a matter of law, and moved in the alternative, pursuant to Federal Rule of Civil Procedure 59, for a new trial. The district court (Stanton, *J.*) denied the motion. Planet Earth appeals from the judgment of the district court and from all related orders and rulings.

We assume the parties' familiarity with the facts, the procedural history, and the specification of issues on appeal.

Appellants argue, *inter alia,* that the evidence presented was legally insufficient to support the jury's verdict. The standards for setting aside a jury verdict for insufficiency of evidence, however, are not easily met. Judgment as a matter of law should be granted "only if there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheet surmise and conjecture, or such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against the moving party." *Yurman Design, Inc. v. PAJ, Inc.*, 262F.3d 101, 108 (2d Cir. 2001) (quoting *Diesel v. Town of Lewisboro*, 232 F.3d 92, 103 (2d Cir. 2000)) (internal quotation mark omitted). Similarly, a new trial should be granted on the grounds that the verdict was against the weight of the evidence only where "the jury has reached a seriously erroneous result or the verdict is a miscarriage of justice." *Farrior v. Waterford Bd. Of Educ.*, 277, F.3d 633, 634 (2d Cir. 2002) (quoting *DLC Mgmt. Corp. v. Town of Hyde Park,* 163 F.3d 124, 133 (2d Cir. 1995)) (alteration omitted). We review *de novo* the district court's denial of a Rule 50 motion, *Yurman,* 262 F3d at 108, and we review for abuse of discretion the denial of a Rule 59 motion, *Munafo v. Metro. Transp. Auth.*, 381 F.3d 99, 105 (2d Cir. 2004).

Here, the record contains sufficient evidence to support the jury's verdict, both with respect to NYU's successful

breach of contract claim, and with respect to Planet Earth's unsuccessful copyright infringement counterclaim. The evidence supports a finding that Planet Earth breached the contract by demanding extra compensation as a condition of producing the public service announcements that it had contracted to provide. *See REA Express, Inc. v. Interway Corp.*, 538 F.2d 953, 955 (2d Cir. 1976). As to the copyright infringement claim, the evidence also supports the jury's finding of fair use, under the four-factored analysis prescribed by statute. *See 17* U.S.C. § 107. While Planet Earth vehemently argues, for instance, that NYU's display of copyrighted material at a fund-raiser was of a commercial nature, *see* 17 U.S.C. § 107(1), this issue is the jury's to decide.

Planet Earth also alleges a number of errors by the trial court, relating to evidentiary rulings, jury instructions, and other matters. Planet Earth objected at trial to some of these ruling, but not to all of them. When claims of error have been preserved by contemporaneous objections, faulty rulings warrant a new trial only if the constituted a "clear abuse of discretion" and were "clearly prejudicial to the outcome of the trial." *Marcic v. Reinauer Transp. Cos.*, 397 F.3d 120, 124 (2d Cir. 2005). When no contemporaneous objection was made, a new trial is warranted only if there was "plain error" that was "so serious and flagrant that it goes to the very integrity of the trial." *Id.* "The burden of demonstrating prejudice requiring reversal rests with the party asserting error." *Hygh v. Jacobs*, 961 F.2d 359, 365 (2d Cir. 1992); *see also Marcic*, 397 F.3d at 124. Because Planet Earth has not shown the requisite harm, we reject its claims of error without determining whether the challenged ruling were, in fact, improper.

We have considered all of Planet Earth's arguments and find them to be without merit.

Accordingly, we AFFIRM the judgment of the district court.

For the Court,
ROSEANN B. MACKECHNIE,
Clerk of Court

by: /s/_____
Oliva M. George, Deputy Clerk